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Jurisdiction over private civil disputes either arising on an Indian reservation or involving Indians as parties has been the subject of a great deal of case law covering a wide variety of situations. The Supreme Court has brought order to the law in this area in such cases as *Williams v. Lee*,[1] *Kennerly v. District Court*,[2] and *Fisher v. District Court*.[3]

However, several major issues remain unresolved by the Supreme Court decisions. Most are practical questions that arise as a result of the special jurisdictional rules that apply to Indian country. State courts and tribal governments are beginning to resolve some of these problems, often employing standard conflict of laws theories. This note will review the current law in the area, identify unresolved issues, and propose solutions suggested by the current law and literature. Special attention will be paid to familiar conflict of laws principles that can offer solutions to the problems.

The Current Law on Indian Civil Jurisdiction

While there is a plethora of law in this area, the only completely reliable precedent comes from the Supreme Court.[4] There are three cases in the modern era[5] that are the foundation for resolving questions in this area. The first is the landmark case of *Williams v. Lee*, decided in 1959.[6] In *Williams*, a non-Indian trading post operator sued a Navajo Indian in state court on a contract made on the reservation. The Supreme Court held that state courts in Arizona had no jurisdiction over the subject matter and that the Navajo Tribal Court was the exclusive forum for adjudication of the case.[7] The Court ruled that state jurisdiction

1. 358 U.S. 217 (1959).
2. 400 U.S. 423 (1971).
3. 424 U.S. 382 (1976).
4. This is evidenced by the fact that all three of the Supreme Court decisions reversed state court determinations of the issues.
5. The "modern era" began with the case of *Williams v. Lee*, where the Court for the first time acknowledged that the rule in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), was no longer the law. The *Worcester* rule is discussed *infra*.
6. 358 U.S. 217 (1959).
7. *Id.* at 223.

in such a case would infringe on the Indians' right of self-government.[8]

The next key case is *Kennerly v. District Court*.[9] *Kennerly* involved essentially the same facts as *Williams*. The Montana Supreme Court ruled in *Kennerly* that because the Blackfoot Tribal Council had passed a resolution purportedly granting jurisdiction in civil disputes between Indians to the state, the state courts therefore had jurisdiction over the subject matter.[10] The Supreme Court disagreed, noting that a state could acquire such jurisdiction only under the terms of Public Law 280.[11] Since the Montana legislature had not passed laws with regard to the Blackfoot Reservation,[12] which complied with the requirements of Public Law 280, the state courts had no jurisdiction regardless of the action of the Blackfoot Tribal Council.[13]

The third Supreme Court decision in this area also involved an appeal from the Montana Supreme Court. *Fisher v. District Court*[14] arose from a state attempt to assert jurisdiction over a child welfare case in which both the parents and the child were Indians residing on the reservation. The Montana Supreme Court again held in favor of the state and the United States Supreme Court again reversed. The Court held, per curiam, that state jurisdiction in such a case would infringe on tribal self-government, and that the state was therefore without jurisdiction.[15] The Court also suggested that since the Northern

8. See the subsection on Torts and Contracts, *infra*.

9. 400 U.S. 423 (1971).

10. Kennerly v. District Court, 154 Mont. 488, 466 P.2d 85 (1970).

11. 28 U.S.C. § 1360, 18 U.S.C. § 1162 (1976). Public Law 280, passed in 1953, gave both civil and criminal jurisdiction to certain states and allowed other states, like Montana, to assert jurisdiction at their option. The law was amended in 1968 to require a vote of the affected tribe approving the assertion of state jurisdiction.

12. Montana had passed a law assuming jurisdiction over Indians on the Flathead Reservation. MONT. REV. CODES ANN. §§ 83-801, 806 (1966).

13. The action of the tribal council came before the 1968 amendment to Public Law 280. 400 U.S. 423, 425 (1971).

14. 424 U.S. 382 (1976).

15. "State court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe. . . . It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves." *Id.* at 387-88.

It is unclear why the Court employed the infringement test. The Court first indicates that the *Williams* test applies only where non-Indians are involved in the case, suggesting that a different standard applies when all of the parties are Indians. The Court then said that "since this litigation involves only Indians, at least the same standard must be met before the state courts may exercise jurisdiction." *Id.* at 386. The Court then applied the *Williams* test and held that tribal jurisdiction over the case was exclusive.

Cheyenne Tribe had assumed jurisdiction over such cases after reorganizing under the terms of the Indian Reorganization Act,[16] the state's jurisdiction was preempted by the tribal government.[17]

While the Supreme Court decisions are less than clear in their reasoning,[18] they do provide guidelines for the division of authority between state and tribal courts. Tribal courts have exclusive jurisdiction over any civil dispute arising on the reservation where the defendant is an Indian,[19] and particularly where only Indians are parties to the case.[20] The state courts have jurisdiction over other disputes only if state jurisdiction will not infringe on tribal self-government,[21] and if such jurisdiction is not preempted by the tribe[22] or the federal government.[23] As a general rule then, the state has jurisdiction over cases involving only non-Indians,[24] cases arising off the reservation,[25] or cases over which Congress has authorized state jurisdiction.[26]

Several issues remain unresolved. Most important is the question of whether the tribe has exclusive jurisdiction over an action arising on the reservation where an Indian is the plaintiff and the defendant is a non-Indian. While it is clear that the tribe has jurisdiction over both the subject and the parties,[27] it is not so clear that its jurisdiction is exclusive.[28] Several other issues arise as practical results of the Supreme Court decisions. For example, the question of whether Indian court judgments are entitled to full faith and credit remains open.[29] In a like vein, there is no

16. 25 U.S.C. §§ 461-479 (1976). Adopted in 1934, the Indian Reorganization Act introduced broad reforms in Indian policy, the most important of which was the revitalization of tribal governments.

17. 424 U.S. 382 (1976).

18. See notes 15 *supra*. *See also* Barsh, *The Omen: Three Affiliated Tribes v. Moe and the Future of Tribal Self-Government*, 5 AM. INDIAN L. REV. 1 (1977).

19. Williams v. Lee, 358 U.S. 217 (1959).

20. Fisher v. District Court, 424 U.S. 382 (1976).

21. Williams v. Lee, 358 U.S. 217 (1959).

22. Fisher v. District Court, 424 U.S. 382 (1976).

23. Congress can preempt any subject matter relating to Indians. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

24. *Compare* New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).

25. *Compare* Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

26. *Eg.*, civil and criminal cases under Public Law 280.

27. *Compare* Williams v. Lee, 358 U.S. 217 (1959).

28. There is no Supreme Court case that so holds.

29. The Supreme Court has recognized, in dicta, that "Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts." Santa Clara Pueblo v. Martinez, 436

clear agreement as to the power of the state to enforce a judgment or serve process against an Indian who resides on the reservation, even though the state has subject matter jurisdiction to determine liability.[30] These and other issues will be analyzed in detail in the following sections.

Subject Matter Jurisdiction

Subject matter jurisdiction is the power of a court to hear a particular kind of case. State courts are often courts of general jurisdiction, meaning that they have the authority to hear any subject matter that constitutes a cause of action. Even when the event being sued upon takes place outside the territorial jurisdiction of a given state, the state's courts still have subject matter jurisdiction over the case, with only a few exceptions.[31] Such is not the case when the event being sued upon takes place in Indian country. In such cases, the subject matter jurisdiction of the state is often defeated and tribal courts become the exclusive forum for adjudication. While this holds true for all kinds of actions, it is useful to analyze different types of actions separately so that the considerations important in each may be understood in their proper context.

Torts and Contracts. Torts and contracts are generally considered to be "transitory" actions, meaning that they can be sued upon in any court having jurisdiction over the parties.[32] Such is not always the case when the tort is committed or the contract entered into on the reservation. Tribal jurisdiction is often exclusive, even where no other government could claim exclusive jurisdiction over such a case.[33]

This is clearly true when the case involves only Indians and the action arises on the reservation. In *Williams v. Lee*, only the defendant was an Indian, yet the jurisdiction of the tribal court

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U.S. 49, 65 n.21 (1978). Still, there is no clear holding to that effect. *But cf.*, Mackey v. Coxe, 59 U.S. (18 How.) 100 (1855).

30. *Compare* Little Horn State Bank v. Stops, 170 Mont. 510, 555 P.2d 211 (1976), *cert. denied*, 431 U.S. 924 (1977), *with* Annis v. Dewey County Bank, 335 F. Supp. 133 (D.S.D. 1971).

31. The exceptions are so-called "local" actions, which relate to the ownership and possession of real property. Only the state in which the land is located has jurisdiction over such actions. H. GOODRICH & E. SCOLES, CONFLICT OF LAWS 177-78 (4th ed. 1964) [hereinafter cited as GOODRICH & SCOLES].

32. *Id.*

33. Assuming that the Arizona court could acquire personal jurisdiction, it would have subject matter jurisdiction over a contract made anywhere in the world, except in Indian country. *Id.* at 198-202.

was found to be exclusive. The *Williams* Court reviewed the history of Indian immunity from state law, noting first the doctrine of *Worcester v. Georgia*.[34] *Worcester* held that because Indian tribes were distinct and independent political entities,[35] the conduct of relations with the Indians was left solely to the federal government.[36] State law was, therefore, "of no force" on the reservation.[37]

The *Williams* Court then pointed out that the *Worcester* doctrine had undergone considerable modification over the years, "in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized."[38] The Court then laid the modern test for resolving questions of state jurisdiction over reservation activities: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[39]

The acts of Congress that concerned the *Williams* Court were the Indian Reorganization Act[40] and Public Law 280.[41] Neither law supported the exercise of state jurisdiction. The Indian Reorganization Act involved a broad program of reforms in Indian policy that were based on the notion that tribal governments should be revitalized and allowed to exercise fully and freely their powers of self-government. Public Law 280 allowed states to assume both criminal and civil jurisdiction over Indian reservations.[42] However, since the Navajo Tribe was exercising its powers of self-government, and the state had not adopted jurisdiction pursuant to Public Law 280, neither statute supported the argument for state jurisdiction.[43]

Because there were no "governing Acts of Congress," the

34. 31 U.S. (6 Pet.) 515 (1832).

35. *Id.* at 558.

36. *Id.* at 561.

37. *Id.*

38. Williams v. Lee, 358 U.S. 217, 219 (1959).

39. *Id.* at 220.

40. 25 U.S.C. §§ 461-479 (1976).

41. 28 U.S.C. § 1360, 18 U.S.C. § 1162 (1976).

42. Five states, California, Oregon, Nebraska, Minnesota, and Wisconsin, were granted jurisdiction in the Act. The rest of the states were given the option of assuming jurisdiction by legislation. *Id. See also* Washington v. Confederated Tribes & Bands of the Yakima Indian Nation, 439 U.S. 463 (1979).

43. The Court pointed out that Arizona may have declined to accept Public Law 280 jurisdiction "because the people of the state anticipate that the burdens accompanying such power might be considerable." 358 U.S. 217, 222-23 (1959).

Court turned to the question of whether state jurisdiction in such a case would infringe on tribal self-government. The Court made its finding clear:

> There can be no doubt that to allow the exercise of state jurisdiction in this case would undermine the authority of tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservation.[44]

Clearly, any time an action arises on the reservation and the defendant is an Indian, the jurisdiction of the tribal court is exclusive.

Simple though that rule may seem, there are traps for the unwary. *Williams* involved the simplest of all situations—a contract entered into and to be performed on the reservation. Suppose instead that the contract had been signed on the reservation, but was to be performed off the reservation. Where is the situs of the contract? Turning to torts, suppose an Indian committed a negligent act on a reservation that resulted in injury off the reservation. Where is the situs of the tort? Conflict of law principles suggest that the courts of both the state in which the contract is made (or the negligent act committed) and the state in which performance is to take place (or injury results) have jurisdiction to hear the case.[45] However, we know from *Williams* that the jurisdiction of tribal courts is often exclusive even where a state's jurisdiction would not be.

While there is no definitive answer to the question, consideration of the interests the *Williams* Court found important indicates that the jurisdiction that was the site of the Indian defendant's conduct will have jurisdiction over the subject matter. Thus, if an Indian signs a contract on the reservation, an action arising from the contract in which the Indian was the defendant would be heard only in tribal court.[46] However, if the Indian signed the contract off the reservation, state courts have subject matter jurisdiction to hear any case arising from the contract.[47] A similar

44. *Id.* at 223.

45. GOODRICH & SCOLES, *supra* note 31, at 177-78, 198-202; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2), Comment *e* (1971).

46. Williams v. Lee, 358 U.S. 217 (1959).

47. Annis v. Dewey County Bank, 335 F. Supp. 133 (D.S.D. 1971).

result would be reached in a tort action. If the Indian tortfeasor's conduct takes place on the reservation, the tribal court has exclusive jurisdiction over the subject matter.[48] Even if the conduct results in off-reservation injury, the jurisdiction of the trial court is still exclusive because to allow a state court to pass judgment on an Indian's on-reservation conduct would plainly "infringe on the right of reservation Indians to make their own laws and be ruled by them."[49]

Clearly, the jurisdiction of the tribal court is exclusive where the defendant is an Indian and the cause of action arises on the reservation. This, however, assumes that the tribe has asserted jurisdiction. This assumption may be critical. It has not yet been squarely decided by the Supreme Court whether exclusive tribal jurisdiction depends upon the tribe asserting its power. While most tribes have courts, some do not, and many of those that do will not hear certain kinds of cases.[50] This can and has resulted in plaintiffs losing their remedy solely because the cause of action arose in Indian country.[51] Still, the better arguments favor the view that the tribe need not actually be willing to hear a certain case before its jurisdiction over the subject matter is exclusive. As a legal matter, there is no suitable theory explaining from whence a state could derive authority, even when there is no tribal court.[52] The nonexistence of tribal courts does not serve as an affirmative grant of power to the states. *Kennerly* says that such an affirmative grant of jurisdiction is necessary before the state can assert jurisdiction.[53]

As a matter of policy, that a legitimate plaintiff may lose his remedy does not outweigh the tribes' right to make or not to make certain laws, to provide or not to provide certain remedies. That a tribe does not hear certain causes of action may be the result of a policy decision by the tribe, or it may be that the particular situation is so infrequent on the reservation that there has been no need to recognize such an action. In either case, it is as much an exercise of self-government to refuse to hear certain

48. Schantz v. White Lightning, 502 F.2d 67 (8th Cir. 1974); Valdez v. Johnson, 68 N.M. 476, 362 P.2d 1004 (1961); Gorneau v. Smith, 207 N.W.2d 256 (N.D. 1973); Smith v. Temple, 82 S.D. 650, 152 N.W.2d 547 (1967).

49. Williams v. Lee, 358 U.S. 217, 220 (1959).

50. Canby, *Civil Jurisdiction and the Indian Reservation,* 1973 UTAH L. REV. 206 [hereinafter cited as Canby].

51. *See, e.g.,* Schantz v. White Lightning, 502 F.2d 67 (8th Cir. 1974).

52. Since *Worcester v. Georgia,* the Court has never allowed state courts to assert jurisdiction over Indians in the absence of a specific congressional grant of such power.

53. 400 U.S. 423, 427 (1971).

cases as it is to hear them.[54] State courts often refuse to hear actions which the courts of another state would hear. This is the source from which the entire field of conflict of laws comes. Given the relatively small number of cases that are brought in tribal courts, the danger of denying a legitimate plaintiff his day in court is remote and more than justified by the policy of strengthening tribal self-government.

The question of jurisdiction becomes more complicated when the defendant is a non-Indian and the plaintiff is an Indian seeking to sue in state court. In such situations, some state courts have taken a debatable position in favor of state jurisdiction. In *Paiz v. Hughes*,[55] a 1966 New Mexico case, the state supreme court held that the state had jurisdiction over a tort committed on the reservation, with the Indian as plaintiff and a non-Indian as the defendant. The plaintiff brought the action in state court because the tribal court would not hear cases where non-Indians were the defendants. The court reasoned that state courts must be open to Indian plaintiffs as a matter of equal protection, at least where no important tribal or federal interests were at stake. The court said that the cause of action accrued to the individual Indian and was solely an individual matter in which the tribe and the federal government had no interest. The fact that it was the Indian who had invoked the jurisdiction of the state court was significant in the view of the court.[56]

There are several obvious weaknesses in the *Paiz* analysis. While it is true that Indians may sue and be sued in state court like other persons,[57] when the cause of action arises on the reservation that is not always the case. The special political status of Indians is clearly a matter of concern to both the tribal and federal governments. The equal protection argument of the court was rejected by the Supreme Court in the later case of *Fisher v. District Court*[58] and is no longer a meaningful consideration. Fur-

54. *See* Chino v. Chino. 90 N.M. 204, 206, 561 P.2d 476, 479 (1977): "For a state to move into areas where Indian law and procedure have not achieved the degree of certainty of state law and procedure would deny the Indians the opportunity of developing their own system."

55. 76 N.M. 562, 417 P.2d 51 (1966).

56. The tribe did not accept cases involving non-Indians.

57. *See* United States v. Candelaria, 271 U.S. 432 (1926); Felix v. Patrick, 145 U.S. 317, 332 (1892).

58. "The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in deny-

ther, the court in *Paiz* completely ignores the interest of the tribe in having its courts apply its law in cases arising in its territory and involving its members.[59] Finally, the fact that an Indian invokes the state court's jurisdiction fails to explain the source of state power over the case. Recall that the failure of jurisdiction in terms of subject matter is the existence of tribal authority, not the mere fact that one party or the other is of the Indian race.[60] While it is true that an Indian could submit to the jurisdiction of the state court, that serves only to give the state personal jurisdiction. Clearly, the filing of a complaint cannot grant a state jurisdiction over a subject matter that is otherwise beyond its jurisdiction.

Kennerly involved an attempt by a tribal council to give the state jurisdiction. It is obvious that a single Indian cannot grant the state a power that the tribal council could not. *Kennerly, Williams*, and *Fisher* all see an affirmative grant of power to the states, such as Public Law 280, as a prerequisite to the exercise of state jurisdiction over such cases. Since New Mexico did not assume jurisdiction pursuant to Public Law 280, the *Paiz* case must be regarded as suspect precedent.[61]

As a matter of policy, it is difficult to see what difference it should make that the Indian is the plaintiff rather than the defendant. That a cause of action arises on the reservation and involves an Indian gives rise to tribal jurisdiction and explains the tribe's interest in resolving such disputes. That the Indian is the one bringing the action in state court does little to lessen the infringement, which occurs anytime the state asserts jurisdiction over on-reservation activities.

Moreover, that state courts do not apply the substantive law of the tribe in resolving such disputes only furthers the infringement on tribal self-government.[62] It is clear that if a cause of action

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ing an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment is justified because it is intended to benefit the class of which he is a member by furthering the Congressional policy of Indian self-government." 424 U.S. 382, 390-91 (1976).

59. Recall the language of the Court in *Williams v. Lee*: "It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations." 358 U.S. 217, 223 (1959).

60. *Id. See also* Fisher v. District Court, 424 U.S. 382, 390 (1976).

61. This is especially true since both *Kennerly* and *Fisher* were decided after *Paiz v. Hughes.*

62. *See* Canby, *supra* note 50, at 206.

should arise on the reservation, the substantive law of the tribe should be applied even if the case is litigated in state courts.[63]

Domestic Relations. It may be authoritatively said that domestic or family cases arising on the reservation and involving only Indians are within the exclusive jurisdiction of tribal courts. Any doubt on this matter was laid to rest in the case of *Fisher v. District Court.*[64] In *Fisher* the Supreme Court of Montana ruled that the state had jurisdiction over an adoption proceeding where the natural parents and the child were all residents of the Northern Cheyenne Reservation. The Supreme Court reversed, holding that the tribal court had exclusive jurisdiction. The Court noted that state jurisdiction over such a case would clearly infringe on tribal self-government, particularly where the subject matter was one so important to the tribe as child welfare.

The Court also pointed out that there was no affirmative grant of power to the state from the federal government. This is the key point in the case. Recall that *Kennerly v. District Court*[65] held that since the tribe and the state had not followed the procedures under Public Law 280, the state was without jurisdiction even though the Blackfoot Tribal Council had clearly attempted to grant such jurisdiction to the state. The *Fisher* Court, applying the rule from *Kennerly*, found that the state had no jurisdiction. Another important point was that the tribe was able to preempt state jurisdiction by asserting its powers of self-government pursuant to the Indian Reorganization Act. Montana had argued that in times previous to the tribe's reorganization, the state had asserted jurisdiction over such cases. Without passing on the question of whether the exercise of such jurisdiction had been legal, the Court said that even if it was, the tribe had since preempted the subject matter.[66]

While the field of Indian child welfare has now been preempted by the Indian Child Welfare Act of 1978, the cases on child custody before the passage of that act are enlightening and will be

63. *See* GOODRICH & SCOLES, *supra* note 31, at 165; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, Comments *c, d, f, g,* and *i* (1971).

64. 424 U.S. 382 (1976).

65. 400 U.S. 423 (1971).

66. "The tribal ordinance conferring jurisdiction on the Tribal Court was authorized by § 16 of the Indian Reorganization Act, 25 U.S.C. § 476. Consequently, it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians. Accordingly, even if we assume that the Montana courts properly exercised adoption jurisdiction prior to the organization of the Tribe, a question we do not decide, that jurisdiction has now been pre-empted." 424 U.S. 382, 390 (1976).

discussed below. Their precedential value is, of course, extremely limited, but they are instructive applications of the jurisdictional doctrines that are the subject of this note.

Child Welfare. In the area of child custody and welfare, state courts have consistently acknowledged exclusive tribal jurisdiction where the parents are Indians and the child is domiciled on the reservation. In *Wakefield v. Little Light*,[67] a Crow Tribal Court had awarded temporary custody of a neglected Indian child to a non-Indian couple. The couple eventually took the child with them to Maryland, where they petitioned the state court for an adoption decree naming them as parents of the child. Meanwhile, the natural mother of the child had petitioned the Crow Tribal Court for custody of her child. The Maryland Court of Appeals ruled that the tribal court had exclusive jurisdiction over the case.[68] The court reasoned that the Crow court had continuing jurisdiction over the child and had the power to order the foster parents to return the child.[69] Further, the court believed that the jurisdiction of the Crow Tribal Court was entitled to the same deference as that of a sister state.[70] The *Wakefield* court recognized that under normal conflict of laws principles it could assert jurisdiction over the subject matter based on the presence of the child within the state.[71] However, the original and continuing jurisdiction of the Crow Tribal Court was seen to oust the state from exercising jurisdiction.[72]

An extremely principled and enlightened use of standard conflict of laws analyses in the context of Indian child welfare is found in the case of *Wisconsin Potowatomies v. Houston*.[73] In that case, the Indian grandfather of a child whose parents had died in a tragic murder-suicide petitioned the federal district court for an order releasing the child from custody of custodians named in a state court action. The grandfather based his claim on the theory that, even though the tribe did not have a formal tribal court to hear the case, tribal customary law dictated that the child be taken in by the grandfather. State jurisdiction over the case was found to be infringement, even though it was the Indian who

67. 276 Md. 333, 347 A.2d 228 (Ct. App. 1975).

68. *Id.*, 347 A.2d at 237-38.

69. *Id.* at 237.

70. *See also In re* Adoption of Buehl, 87 Wash. 2d 649, 555 P.2d 1334 (1976).

71. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 22, Comment *h* (1971); 347 A.2d 228, 237 (Ct. App. 1975).

72. 347 A.2d at 238.

73. 393 F. Supp. 719 (W.D. Mich. 1973).

had invoked the power of the state court.[74] The federal court looked only to the question of where the child was domiciled in determining the issue. Using a straightforward conflict of laws analysis, the court found that the child was domiciled on the reservation and that tribal law applied.[75] Considerable testimony concerning the customary law of the tribe was presented, and the court found that tribal custom would grant custody to the grandfather.

The *Houston* case is interesting for a variety of reasons. First, note that the domicile of the child was the controlling factor in the case. Second, the court employed normal conflict of laws principles in determining domicile. Third, tribal jurisdiction and its exclusivity was upheld even where there was no formal tribal court. Fourth, it was tribal customary law, not codified written law, which was chosen and applied in the case. This approach is important because many state courts would undoubtedly use the fact that there was no tribal court or code to support a finding of no infringement on tribal self-government and justify state jurisdiction over such a case.

Divorce. The current law on jurisdiction over divorce actions involving Indians is unnecessarily confused. Because there is no Supreme Court precedent, the state courts have been deciding the issue with confusing and incorrect results. One of the earliest cases is *Tenorio v. Tenorio*,[76] a 1940 New Mexico decision holding that the state court had jurisdiction to grant a divorce to two Indian residents of the Santo Domingo Pueblo. The court reasoned that the Pueblo Indians of New Mexico were not independent political communities as the Cherokees of Georgia had been.[77]

The first case decided after the decision in *Williams v. Lee* was

74. "To petition the state court to voluntarily grant him custody of the children was rational, given his interest in the children. In so doing, he submitted himself to the personal jurisdiction of the court as to that case. But the actions of an individual person, even if in accord with custom, cannot create subject matter jurisdiction over Indian affairs in state court." *Id.* at 733.

75. The court noted that jurisdiction over child custody matters is determined by the domicile of the child, and that the child's domicile was that of the parent with whom he lived. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 313 (1971). The mother had moved off the reservation and taken the children with her, but because she had not established a new domicile, both her domicile and that of the children remained on the reservation. *Id.* at § 15; 393 F. Supp. 719, 732 (W.D. Mich. 1973).

76. 44 N.M. 89, 98 P.2d 838 (1940).

77. 44 N.M. at 93, 98 P.2d at 842.

Whyte v. District Court.[78] The Colorado Supreme Court there held that the state had no jurisdiction over a divorce action between two Indians residing on the Ute Mountain Reservation. The court applied the *Williams* test, finding that state jurisdiction would clearly be infringement. Of more interest, though, the court said that the test for resolving the question where only Indians were involved "is not whether a state has disclaimed jurisdiction, but whether Congress has authorized such jurisdiction within the state."[79] In light of the holdings in *Kennerly* and *Fisher*, the Colorado court's formulation of the test appears to be correct.[80]

Still, some states, notably Montana, purport to have jurisdiction over such cases. In *Bad Horse v. Bad Horse*,[81] the Montana Supreme Court held that the state courts had jurisdiction to grant a divorce between two Indians, each residing on their respective reservations.[82] The court advanced two theories in finding that the holdings in *Williams* and *Kennerly* were not controlling. The first was frivolous. The court argued that because the marriage ceremony itself was conducted off the reservation and within the state, the state courts had jurisdiction.[83] More interesting was the infringement analysis. The court pointed out that in 1937 the tribe had passed an ordinance requiring all Indian marriages to be performed in compliance with Montana law, and that since that time the tribal courts had not exercised jurisdiction over divorces. The ordinance itself is irrelevant,[84] but the failure of the tribal courts to hear such actions supports Montana's argument that state jurisdiction in such a case would not infringe on tribal self-government.[85]

78. 140 Colo. 334, 346 P.2d 1012 (1959), *cert. denied*, 363 U.S. 829 (1960).

79. *Id.*, 346 P.2d at 1015.

80. *Compare* Bryan v. Itasca County, 426 U.S. 373 (1976); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

81. 163 Mont. 445, 517 P.2d 893 (1974), *cert denied*, 419 U.S. 847 (1974).

82. The plaintiff-husband was a resident of the Northern Cheyenne Reservation, and the defendant-wife and her child were residents of the Fort Bethold Reservation.

83. Quite obviously, the fact that a marriage takes place in a state has little bearing on the question of jurisdiction to grant a divorce. Divorce jurisdiction is based on the presence of one or more of the parties in the jurisdiction. GOODRICH & SCOLES, *supra* note 31, at 255; RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 71-72 (1971).

84. The ordinance simply stated that Indian marriages would be in compliance with Montana law. This section is standard in tribal codes and can be found at 25 C.F.R. § 11.27 (1980). It can hardly be read as a grant of divorce jurisdiction to the state.

85. *See* Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966).

It is not clear that there is no infringement in such a case. Suppose that the tribe simply opposes divorce as a matter of policy, as does every government, and that this tribal policy is so strong that the tribe had simply closed the courthouse doors to such actions. It is a clear undercutting of tribal policy for the state to then grant the divorce. Furthermore, such an assertion of state jurisdiction tends to deprive the tribe of the opportunity to adapt the law to its beliefs: "Indian customs and traditions may dictate different approaches than that which the state may use. For a state to move into areas where Indian law and procedure have not achieved the degree of certainty of state law and procedure would deny the Indians the opportunity of developing their own system."[86] It is obvious that for state courts to assume jurisdiction over actions not recognized by tribal law is to "infringe on the right of reservation Indians to make their own laws and be governed by them."[87]

Again, there are elementary conflict of laws principles that provide solutions to several problems. Generally, the state should take jurisdiction over Indian divorces only when one party is domiciled off the reservation.[88] Even then, only if both parties are domiciled off the reservation should the court make a property settlement and set alimony.[89] On the other side of the reservation boundary, Indian tribes must modernize their codes to serve their members who seek divorce, or at least make firm policy pronouncements on the subject one way or the other. However, it is clear that unless tribal courts will assert their power over all cases within the reservation, they are inviting the type of interference which the *Bad Horse* case represents.[90]

Real Property Actions. Actions directly affecting title to or possession of real property are considered to be "local" actions, meaning that they can only be brought in the state within whose territory the land is located.[91] While there is a paucity of law on the subject, the same is apparently true when the land in question is located in Indian country.

86. Chino v. Chino, 90 N.M. 204, 206, 561 P.2d 476, 479 (1977).

87. Williams v. Lee, 358 U.S. 217 (1959).

88. See note 83 *supra.*

89. Such orders require that the court have personal jurisdiction over both of the parties. GOODRICH & SCOLES, *supra* note 31, at 276. As will be seen *infra*, states have no personal jurisdiction over Indians on the reservation in the absence of additional circumstances justifying state *in personam* jurisdiction.

90. *See* Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206.

91. GOODRICH & SCOLES, *supra* note 31, at 177-81.

In *Chino v. Chino*,[92] a 1979 New Mexico case, the court held that the state had no jurisdiction over a forcible entry and detainer action that arose on the Mescalero Apache Reservation and both of the parties were Indians. The court first noted that the state had disclaimed jurisdiction over Indian lands in its constitution.[93] Further, the state had never assumed jurisdiction pursuant to Public Law 280. "Thus, the treaties and statutes applicable in this case preclude the state from exercising jurisdiction over property lying within reservation boundaries."[94]

The court also found that the infringement test defeated state power.[95]

> An action for forcible entry and unlawful detainer deals directly with the question of occupancy and ownership of land. When the land lies within a reservation, enforcement of the owner's rights to such property by the state court would infringe upon the governmental powers of the tribe, whether those owners are Indians or non-Indians. Civil jurisdiction of lands within the reservation remains with the tribe.[96]

Most interesting is that the court reached this conclusion even though the Mescalero Tribal Court would not hear the action. The court recognized that for the state to accept jurisdiction on the grounds that tribal law did not recognize such a cause of action would deny the tribe the opportunity of developing its own system.[97]

While the result in *Chino* is undoubtedly correct, the court may have overstated its argument. It is not clear that all property actions arising within the reservation are under the exclusive jurisdiction of the tribes. For instance, in a dispute between two non-Indians, the state may have a sufficient governmental interest to assert jurisdiction.[98] However, the standard conflict of laws rule is that jurisdiction over such cases is exclusively within

92. 90 N.M. 204, 561 P.2d 476 (1977).

93. N.M. CONST. art. 21, § 2.

94. 90 N.M. 204, 206, 561 P.2d 476, 479 (1977).

95. The court found three factors to be generally relevant in applying the infringement test: (1) The race of the parties, (2) whether the action arises from events on or off the reservation, and (3) the nature of the tribal interest at stake. *Id.* at 206, 561 P.2d at 479.

96. *Id.*

97. See note 54 *supra.*

98. *Compare* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).

the "state"[99] in which the property is located.[100] Therefore, tribal jurisdiction may well be exclusive, particularly where the tribe can point to a particular and legitimate governmental interest which would be jeopardized by an assertion of state jurisdiction.[101]

Probate.[102] When a person dies, the state in which he dies domiciled has jurisdiction to probate the estate. When the decedent is an Indian resident of the reservation, it is clear that the tribe should have exclusive jurisdiction over his estate.[103] More difficult problems arise when the decedent is a non-Indian resident of the reservation. Both the state and the tribe can fairly assert an interest in the estate in that both can claim that the decedent was a resident within their territory.[104] In such a case, unless there is some important tribal interest at stake,[105] there is reason to allow the state courts to probate the estate. The jurisdiction should be concurrent in such a case, giving the person bringing the suit a choice as to which forum will hear the case.

The major difficulty in this area is that many tribal courts will not hear cases involving non-Indians.[106] To the extent that the tribes fail to exercise their authority over such estates, it is clear that they are inviting the state to assert its power. Thus, the onus is on the tribes. If they assert their power, their right to do so will be protected. If they do not, their complaints as to state infringement probably will, and in this special area should, fall on deaf ears.[107]

99. "State" is defined at section 3 of RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) as: "a territorial unit with a distinct body of law." *See also id.*, Comments *c* & *e*. Indian governments would clearly come within this broad definition.

100. GOODRICH & SCOLES, *supra* note 31, at 177-81.

101. For intance, if the tribe had adopted a comprehensive zoning or housing code, it would have a clear and legitimate interest in the outcome of a suit disputing ownership or possession of real estate within the reservation.

102. Because of the complexities of probate of Indian trust property, this note will deal only with issues regarding nontrust property. *See* Comment, *Too Little Land, Too Many Heirs—The Indian Heirship Land Problem*, 46 WASH. L. REV. 709 (1971).

103. GOODRICH & SCOLES, *supra* note 31, at 340-43.

104. While the reservation boundary is effectively a barrier blocking state power over Indians, the state is not blocked from affecting non-Indians on the reservation. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).

105. For example, the decedent's spouse could well be an Indian resident of the reservation. In such a case, the tribe would have a clear interest in guaranteeing the spouse's future economic security.

106. *See* Canby, *supra* note 50.

107. Probate, like death and taxes, is inevitable. It would be different if the action did not have to be brought. However, the death of a person requires a series of legal steps be taken in order to close the decedent's affairs. If the tribes are unwilling to provide a

Cases Arising Off the Reservation

In many cases involving Indians as parties, state courts are found to have subject matter jurisdiction based on the fact that the cause of action arose from events taking place off the reservation. In *Little Horn State Bank v. Stops*,[108] the Montana Supreme Court found that the state courts had subject matter jurisdiction over a contract action between an Indian and a non-Indian. The transaction had taken place off the reservation. This, and the tribal court not taking jurisdiction over the case, led the court to find that the state had jurisdiction over the subject matter.[109]

In the area of domestic relations, the on-reservation off-reservation distinction is equally important. A 1972 Montana case, *In re Cantrell*, demonstrates the importance of the distinction.[110] In *Cantrell*, the child was originally a domiciliary of the reservation where the parents resided. The child was found abandoned off the reservation and spent about a year in an off-reservation foster home. The natural mother made no attempt to have the child returned to her during this time. The tribal court had previously taken the child from its mother for a time, but had returned the child to her before the abandonment occurred. The Montana court included no analysis of whether the jurisdiction of the tribal court was continuing, and no analysis of the domicile of the child.

In *Adoption of Doe*,[111] a 1976 New Mexico case, the court found that the state courts had jurisdiction over Indian child custody where the natural mother places the child for adoption in the state courts. In *Doe*, the mother was a Navajo Indian living off-reservation in a town bordering the reservation. The child's Navajo grandfather had argued in state court that the tribe had exclusive jurisdiction over the child. The court noted that the child and his mother were not reservation residents, and that they had few contacts with the reservation. While the tribal court may have had jurisdiction over the child, the court in *Doe* held that the off-reservation residence of the child was sufficient to give the state at least concurrent jurisdiction over the case.

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forum, the needs of the decedent's heirs dictate that the state provide one.

108. 170 Mont. 510, 555 P.2d 211 (1976), *cert. denied*, 431 U.S. 924 (1977).

109. The court was correct in this finding, but went on to hold that the state could enforce its judgment by executing on property owned by an Indian and located on the reservation. This holding is examined *supra* in the first part of this note.

110. 159 Mont. 66, 495 P.2d 179 (1972).

111. 89 N.M. 606, 555 P.2d 906 (Ct. App. 1976).

These cases make it plain that when Indians leave the reservation, they are subject to the same laws as any other person within the state. This is the clear teaching of many Supreme Court cases as well as those noted above.

Summary

The subject matter jurisdiction of state courts and tribal courts is fairly clear, although there is no unanimity in the cases on some questions. If a case arises on the reservation and involves only Indians, the state has no jurisdiction, assuming Public Law 280 jurisdiction has not been assumed. When both Indians and non-Indians are involved, the situs of the Indian party's conduct should be controlling. If the Indian was on the reservation, tribal jurisdiction is exclusive. If the Indian acted off the reservation, the subject matter jurisdiction of the state and the tribe is concurrent.

This discussion has assumed that the court having subject matter jurisdiction also has jurisdiction over the parties. As will be seen in the following section, such is not always the case.

Personal Jurisdiction

Even after it has been determined that one or more governments have subject matter jurisdiction over a case, the issue of personal jurisdiction must still be resolved. Often a state court can have subject matter jurisdiction, as when a case arises off the reservation, and still not have personal jurisdiction over the defendant if he is an Indian residing on the reservation. This anomaly has resulted in a number of poorly reasoned and probably incorrect decisions in state courts, which will be discussed *infra*. Note also that even though a state court may have jurisdiction over an Indian for purposes of determining liability, it may not have jurisdiction for purposes of enforcing the judgment against a reservation resident by executing on property located on the reservation.

Jurisdiction over Non-Indians

When it comes to non-Indians on the reservation, tribal and state courts both have jurisdiction over the person.[112] Tribal

112. Williams v. Lee, 358 U.S. 217 (1959) (tribal jurisdiction over non-Indians on the reservation); Langford v. Monteith, 102 U.S. 145 (1800) (state jurisdiction over non-Indians on the reservation).

authority comes from the residual sovereignty of Indian tribes, part of that sovereignty being the power to regulate the conduct of persons within the territorial jurisdiction of the tribe. State jurisdiction derives from the fact that reservations are located within the state's boundaries, and its residents are state citizens.[113] Further, non-Indians do not have the same special relationship with the federal and tribal governments that Indians enjoy.[114] This section will look at the development of these rules, discuss recent decisions, and point out problems which are as yet unresolved.

The key problems in this area are easily solved. Most problems occur when a court has jurisdiction to render a judgment but does not have the authority to enforce the judgment.[115] Most often, this situation arises when an Indian incurs liability off the reservation and returns to the reservation where he is beyond the reach of state law. The opposite situation is where the non-Indian incurs liability while on the reservation and then leaves with no intent to return. In both situations, the easy answer is to allow the judgment to be enforced in the court having personal jurisdiction by giving the judgment full faith and credit or comity treatment.[116] It is clear that neither the Indian nor the non-Indian should be able to use the reservation boundary as a buffer against payment of liabilities.

Another problem arises where a tribal court renders a judgment against a non-Indian reservation resident who simply refuses to acknowledge tribal authority over him. Refusal to pay a judgment could probably result in a civil contempt proceeding against an Indian, but a recent Supreme Court decision renders doubtful the power of a tribe to use such a proceeding against a non-Indian.[117] This leaves the tribal court with the single option

113. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).

114. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).

115. *See* Annis v. Dewey County Bank, 335 F. Supp. 133 (D.S.D. 1971).

116. Full faith and credit and comity are related doctrines. Full faith and credit derives from the U.S. Constitution, art. 4, § 1. Comity is a common law doctrine deriving from the notion that nations should respect the law of other nations over matters properly within the other nation's jurisdiction. *See* Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. REV. 133 (1977).

117. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), where the Court ruled that Indian tribes have no authority to try criminal charges against non-Indians, based on the notion that the liberty interest of American citizens renders criminal jurisdiction over non-Indians inconsistent with the dependent status of the tribes.

of sending tribal police officers to execute against the non-Indian's property, which could be a tense and potentially violent situation, particularly where the non-Indian doubts the authority of the tribe.

Despite these problems, the law is clear. When a non-Indian incurs liability on the reservation, assuming that he can be served with process either on the reservation or pursuant to a tribal long-arm statute, he is clearly subject to the personal jurisdiction of the tribe.[118] So long as state courts grant tribal court judgments full faith and credit, there are no insurmountable problems in this area.

The law on full faith and credit for Indian court judgments is not clear, although most states have begun to acknowledge that tribal judgments are entitled to such treatment.[119] In *In re Estate of Lynch*,[120] there was a will contest brought in state court in Arizona. The will had previously been probated in Navajo Tribal Court before the initiation of the state court action. The court recognized that tribal jurisdiction was often exclusive, and concluded that "the proceedings held in the Navajo Tribal Court must be treated the same as proceedings in a court of another state or country. . . ."[121] The court did not go so far as to say that the tribal judgment was entitled to constitutional full faith and credit,[122] but its decision implies as much.

Some courts have been more direct. In *Jim v. C.I.T. Financial Services Corp.*,[123] the New Mexico Supreme Court found that tribal court judgments were entitled to full faith and credit because 28 U.S.C. § 1738 (the statute implementing the full faith and credit clause) requires that full faith and credit be extended to the courts of a "territory." The Navajo Tribe, according to the court, is a "territory" within the meaning of the statute. This less than satisfactory approach was followed without comment in *Adoption of Buehl*,[124] a 1976 Washington case.[125]

118. Williams v. Lee, 358 U.S. 217 (1959) makes clear that tribes have authority over persons committing liability-producing acts on the reservation.

119. *See* Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. REV. 133 (1977).

120. 92 Ariz 354, 377 P.2d 199 (1962).

121. *Id.*, 377 P.2d at 201.

122. As opposed to the common law notion of comity.

123. 87 N.M. 362, 533 P.2d 751 (1975).

124. 87 Wash. 2d 649, 555 P.2d 1334 (1976).

125. For a critique of the result in *Jim, see* Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. REV. 133 (1977).

Other courts have refined the rationale in searching for grounds to reach the practical and proper result that Indian court judgments are binding on state courts. In *Red Fox v. Red Fox*,[126] the Oregon Court of Appeals dealt with a divorce decree issued by a tribal court. The court discussed the Indian sovereignty doctrine and concluded that:

> [W]hile the decisions of tribal courts are not . . . entitled to the same "full faith and credit" accorded decrees of sister states, the quasi-sovereign nature of the tribe does suggest that judgments rendered by tribal courts are entitled to the same deference shown decisions of foreign nations as a matter of comity.[127]

The court discussed the requirements of comity and found that the tribal court judgment met them all.[128] This approach is sound. It recognizes that Indian court jurisdiction is often exclusive, and the integrity of these judgments being given comity treatment is guaranteed by the analysis employed by the Oregon court. Further, given that the Indian Civil Rights Act[129] requires that tribal courts accord due process and equal protection, Indian tribal court judgments should be presumed to meet the requirements of comity because these are little more than the basics of notice and opportunity to be heard. Still, there is need for a statement from the Supreme Court on this issue. Only that will settle the problem.

Jurisdiction over Indians

Jurisdiction over Indians on the reservation has been the source of much disagreement among state courts, when in fact it is a simple situation to analyze. There is no question that tribal courts have jurisdiction over Indians on the reservation.[130] States, on the other hand, have no inherent authority over Indians on the reservation. This has been the law from the early days of the

126. 23 Or. App. 393, 542 P.2d 918 (1975).

127. *Id.*, 542 P.2d at 920.

128. The four requirements listed by the court were: (1) that the foreign court have had jurisdiction, (2) that the decree not be obtained fraudulently, (3) that the foreign court reasonably assures the requisites of impartial administration of justice, and (4) that the judgment not contravene the public policy of the state in which it is relied upon. These are the standard requirements found in the conflict of laws rules of most states. 542 P.2d at 922.

129. 25 U.S.C. §§ 1301-1303 (1976).

130. Williams v. Lee, 358 U.S. 217 (1959).

Republic. The Trade and Intercourse Acts,[131] *Worcester v. Georgia*,[132] and Public Law 280[133] all point to the inescapable conclusion that state law cannot reach Indians on the reservation absent a specific grant of such authority from Congress. Still, many state courts have misperceived the issue and asserted jurisdiction over Indians on the reservation.

Thus, in *Natewa v. Natewa*,[134] a New Mexico court held that the state had jurisdiction to enforce a child support order against an Indian resident of the Zuni Pueblo which had been issued in Wisconsin. While there was no question that the Wisconsin court had jurisdiction to issue the order, it was not so clear that New Mexico could enforce the judgment. The court reasoned that since the Zuni Tribal Court would not enforce the obligation, there would be no infringement if the state court enforced it. The court also said that unless Congress had expressly granted or reserved such authority to the Indians, the state had jurisdiction. This is plainly incorrect.[135] However, it is clear that if the Zuni court had been willing to hear the case, a different result may well have resulted.

Similarly, in *State Securities v. Anderson*,[136] a 1973 New Mexico case, the court held that the state had authority to serve process on an Indian on the reservation in an action over a contract dispute arising off the reservation. The court applied the same misstatement found in the *Natewa* case, that unless Congress had forbade the state from exercising jurisdiction, it could do so. The court went on to say that the jurisdiction of the state and the tribe in such cases was concurrent, and therefore no infringement on tribal self-government would result from state jurisdiction.

The correct view on the question may be found in *Annis v. Dewey County Bank*.[137] The court there held that the state court had no authority to enforce a judgment against an Indian on the reservation. The court noted that although the cause of action arose off the reservation, and the state court therefore had subject matter jurisdiction, the judgment would still have to be enforced on the reservation. Because the state had not adopted Public Law 280 jurisdiction, it simply had no authority over In-

131. 25 U.S.C. § 177 (1976).
132. 31 U.S. (6 Pet.) 515 (1832).
133. 18 U.S.C. § 1160, 25 U.S.C. 1320 (1976).
134. 84 N.M. 69, 499 P.2d 691 (1972).
135. *Williams, Fisher* and *Kennerly* all necessarily reject this view.
136. 84 N.M. 629, 506 P.2d 786 (1973).
137. 335 F. Supp. 133 (D.S.D. 1971).

dians on the reservation. The court argued that the state did not even have the authority to serve process on an Indian on the reservation. An interesting point is that the court in this case, in applying the *Williams* test, ruled that Public Law 280 was a "governing Act of Congress," and the failure of the state to comply with the statute rendered it completely without authority to enforce judgments on the reservation against Indians.

Similarly, in *Francisco v. State*,[138] the Arizona Supreme Court held that the state courts had no jurisdiction over reservation Indians. The case involved a paternity suit, and the court found that the state did have subject matter jurisdiction because conception had occurred off the reservation. However, the court recognized that state court jurisdiction over reservation Indians hinged on the degree to which Congress had authorized state jurisdiction. As the state had not adopted Public Law 280 jurisdiction, the state had no jurisdiction over the Indian on the reservation.

While the issue of personal jurisdiction over reservation Indians is not fully resolved, it is clear that the better arguments favor the view that state courts have no jurisdiction over such persons. As in the area of recognition of tribal judgments in state court, a healthy dose of mutual respect between tribal and state governments can clearly solve the practical difficulties that might result from a finding of no state jurisdiction. First of all, the tribes should adopt procedures for the service of state court process on reservation Indians where the Indian has incurred off-reservation liability. Similarly, the states should adopt long-arm statutes for service of process on reservation Indians.[139] Once service of process has been accomplished, the state has jurisdiction for the purpose of determining the Indian defendant's liability.

Once that determination has been made, the judgment should be brought to the tribal court for enforcement where necessary. Any other procedure would clearly infringe on tribal self-government, particularly where the tribe has laws relating to such enforcement that differ from the law of the state rendering the original judgment. If the tribe should refuse to enforce the judgment, the state can retaliate in a number of ways. It might refuse to grant full faith and credit to tribal judgments. It could refuse

138. 113 Ariz. 427, 556 P.2d 1 (1976).

139. Of course, such a statute would not serve to give the state anything unless there was complete compliance with the terms of Public Law 280. Kennerly v. District Court, 400 U.S. 423 (1971).

to serve process rendered by Indian tribal courts. It could even refuse to hear cases arising on the reservation when brought by Indian plaintiffs. The decision would be the tribes'. They can either join the family of governments that recognize and enforce valid process and judgments from the courts of another, or they can cut themselves off from the benefits of such cooperation, thereby inviting state court interference in their affairs.

Summary and Comment

Unlike the areas of criminal and taxation jurisdiction, jurisdiction over private civil disputes arising in Indian country is clear. This gives both tribal and state governments the opportunity to make policy free from the uncertainties that plague so many areas of Indian law.

The tribes have several tasks to accomplish. The first and most important is comprehensive revision of antiquated and incomplete tribal codes. The tribes must amend their codes to accept jurisdiction over cases involving non-Indians without the consent of the parties. Failure to do so will result in either the case being heard in state court or a loss of remedy for legitimate plaintiffs. Clearly, neither result is desirable. The tribes must also expand their codes to cover the range of actions available under state law. This does not mean that they must recognize every cause of action the state does. Self-government would be meaningless if the tribes simply adopt *in toto* the law of the states. However, the tribes should make it clear that their failure is the result of a considered policy decision and not mere oversight. In that way, they make it clear that for the state to hear a cause of action arising on the reservation and involving Indians would infringe on tribal self-government.

Both the states and the tribes must develop clear guidelines for the recognition of judgments rendered by the courts of the other. Unless both are willing to recognize the governmental integrity of the other, and begin enforcing the judgments of each other as a matter of course, the reservation boundary will become a shield for both Indians and non-Indians seeking to escape responsibility for actionable conduct taking place both within and without the reservation. It does not matter whether this is done in the name of comity or in the name of full faith and credit.

State courts must accept the exclusive nature of tribal jurisdiction and develop principles to overcome the practical difficulties that arise. The hostile and often lawless decisions coming from such states as Montana does little to resolve the problems and on-

ly increases the ill will between state and tribal governments. If the courts of the states would put their prejudices aside and employ standard conflict of laws theories developed to resolve such disputes between states, consistency and certainty in the law could be achieved.

In short, the tribes and the states have the opportunity to develop law that will truly serve the interest of both state and tribal citizens. All that is required is mutual respect and the expansion and revision of tribal and state laws. If either government fails to do its share, the chaos that exists in the area will continue. The present uncertainty is clearly not in the best interest of the persons who have suffered injury and are seeking redress in the courts. The current confusion is wholly unnecessary, particularly given that conflict of laws principles familiar to all courts provide easy answers to problems troubling both the tribes and the states. Not to employ these principles is to miss an excellent opportunity for tribes and states to work together in providing a better system of law for Indians and non-Indians alike.